Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

REPLY COMMENTS OF RCN TELECOM SERVICES, INC.

Joseph A. Kahl
Director of Regulatory Affairs
RCN TELECOM SERVICES, INC.
105 Carnegie Center
Princeton, NJ 08540
(609) 734-2827

Andrew D. Lipman
James N. Moskowitz
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500

Counsel for RCN Telecom Services, Inc.

Dated: June 10, 1999

TABLE OF CONTENTS

SUMMARY

In their initial comments in the proceeding, the incumbent local exchange carriers ("ILECs") argue that the Commission should interpret Section 251(d)(2) of the Act as though it incorporated many of the tenets of antitrust jurisprudence. This includes the incorporation of the essential facilities doctrine within the "necessary" and "impair" standards and the use of market definition principals developed for use with the federal merger guidelines.

The ILECs analyze the relevant network elements in light of these very strict principals with the predictable result that virtually no network elements need be unbundled under Section 251. The ILECs would have the Commission, or preferably the states, define geographic and product markets for each network element and decide on a market-by-market and element-by-element (and perhaps a competitor-by-competitor) basis which elements available from sources independent of the ILEC, with the fact that a single competitor is using a network element from a source other than an ILEC indicating the element is *per se* available.

This scheme set forth by the ILECs is not consistent with goals Congress embodied within the Act generally, and within Section 251 specifically. Congress intended to remove the regulation of local competition from the direct jurisdiction of the federal courts and from judicially created regulatory mechanisms, like the essential facility doctrine. Furthermore, injecting antitrust principals into the Act in the way suggested by the ILECs is contrary to the pro-competitive goals of the Act in general, contrary to the language of Section 251, and not required by the Supreme Courts decision in *Iowa Utilities Board.*

Consequently, the Commission cannot adopt the approach suggested by the ILECs and instead should establish a national list of minimum UNEs which all ILECs must make available to

assist in reaching the 1996 Act's goal of robust and irrevocable competition. The Commission should analyze Section 251(d)(2)'s "necessary" and "impair" standards based on the extent to which, based on the totality of the possible circumstances, the use of alternatives to ILEC network elements would have a material, adverse effect on the ability of competitors to provide service in terms of cost, quality, ubiquity, and of timeliness of service. RCN urges the Commission to bear in mind that the purpose of the statute and this entire proceeding is to create a vehicle to promote robust and irreversible competition for all providers.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	

REPLY COMMENTS OF RCN TELECOM SERVICES INC.

RCN Telecom Services, Inc. ("RCN"), by its undersigned counsel, submits these Reply Comments in response to the Further Notice of Proposed Rulemaking ("*UNE NPRM*") in the above captioned proceeding.[1] In its initial comments, RCN, as well as a number of other commenters, urged the Commission to establish a minimum national list of unbundled network elements ("UNEs") that incumbent LECs ("ILECs") must make available in furtherance of the Communications Act's ("Act" or "1996 Act")[2] goal of creating robust and irrevocable competition. Specifically, RCN called upon the Commission to establish definitions of "necessary" and "impair" based on the extent to which use of alternatives to ILEC network elements would have a material, adverse effect upon the ability of competitors to provide service in terms of cost, quality, ubiquity, and timeliness of service.

---

[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 & 95-185, Second Further Notice of Proposed Rulemaking, DA 99-70 (rel. April 16, 1999) ("*UNE NPRM*").

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, (1996).

RCN reaffirms its earlier position and calls upon the Commission to reject the proposals submitted by the ILECs which would insert the tenets of antitrust law into the analysis required under Section 251(d)(2) of the Act.[3] The ILECs employ these analyses to justify standards under Section 251(d)(2) that are calculated to result in the virtual elimination of the ILEC unbundling obligations established in the 1996 Act. RCN submits that using antitrust principals, which are focused upon the goal of preventing intentional maintenance of monopoly power, to drive the analysis under Section 251(d)(2) would violate the language and intent of that section and undermine the pro-competitive goals of the Act. Instead, the Commission should give substance to the plain words of Section 251(d)(2) and use as its guiding principal the Act's goals of promoting a pro-competitive, national policy encouraging deployment of advanced telecommunications and information technologies by opening all telecommunications markets to competition.[4]

I. INCORPORATION OF ANTITRUST LAW PRINCIPALS INTO SECTION 251(d)(2) IS CONTRARY TO THE LANGUAGE, INTENT AND GOALS OF THE ACT

A number of commenters, and nearly all of the ILECs, advocate the incorporation of the pre-existing body of federal antitrust law into the analysis set forth under Section 251(d)(2). The ILECs' suggested analyses include application of the essential facilities doctrine and its related economic analysis of supply and demand, and the application of market definition principals set forth in the merger guidelines. Application of these antitrust principals would require the Commission (or states) to identify product and geographic markets and then determine on a case-by-case or market-

---

[3] *See, e.g.*, Comments of USTA at 3.

[4] *See* H. Conf. Rep. No. 104-458, 104th Cong., 2nd Sess. 1 (1996) (*"Joint Explanatory Statement"*).

by-market basis, whether a given network element should be unbundled.[5] These antitrust principals are also used to argue against adoption of a national minimum list of UNEs[6] and even against adoption of minimum national standards for unbundling network elements.[7]

As set forth by RCN in its initial comments, application of an antitrust analysis under Section 251(d) is inconsistent with the legislative history, structure and plain language of the 1996 Act.[8] It is axiomatic that by choosing to adopt specific legislation relating to the unbundling of network elements, Congress removed this area from the direct control of judicially created precedents for regulating the industry. Had Congress intended the Commission to adopt antitrust principals in analyzing which network elements to unbundle, it certainly could have done so. As GTE points out, Congress is presumed to intend the judicially settled meaning of terms used in the statute and a reasonable statutory construction takes into account the contemporary legal context in which the statute is enacted.[9] Here, Congress chose *not* to include the specific language associated with the application of the essential facilities doctrine in Section 251(d)(2). Furthermore, here the context is not simply "contemporary antitrust law" as GTE asserts.[10] Rather the context is that of Congress

---

[5] *See* Comments of Ameritech at 67; *see* Comments of Cincinnati Bell Telephone at 3.

[6] Comments of Ameritech at 54; Comments of SBC at 16-18; Comments of GTE at 20-21.

[7] Comments of USTA at 22-27.

[8] *See* 141 Cong. Rec. S 7889-01 (June 7, 1995) (Sen. Pressler) (the 1996 legislation was intended to "terminate the involvement of the Justice Department and the Federal courts in the making of national telecommunications policy").

[9] Comments of GTE at 14 (citing *American Nat'l Red Cross v. S.G. & A.E.*, 505 U.S. 247, 252 (1992) (additional cites omitted)).

[10] *Id.*

removing the issue of interconnection to ILEC facilities from the aegis of federal judicial control and placing it squarely in within the regulatory jurisdiction of the Commission.[11]

Additionally, in its *Iowa Utilities Board* decision the Supreme Court specifically declined to endorse the application of the essential facilities doctrine in the context of application of the standards under Section 251(d)(2), although presented with the direct opportunity to do so.[12] Thus, the strained arguments of the ILECs notwithstanding, the Commission is under no legal mandate to employ antitrust principals when analyzing which network elements must be made available under the standards set forth in Section 251(d)(2) of the Act. This being the case, the Commission is free to give full weight and effect to the pro-competitive policy goals of the Act when determining how to apply Section 251 without having to consider the application of the various tools of antitrust litigation at all.

A. The Essential Facility Doctrine Should Not Be Used When Analyzing Whether A Network Element Is "Available" From A Source Other Than An ILEC

In *Iowa Utilities Board*, the Supreme Court instructed the Commission to, in deciding which elements to designate as UNEs, consider "the availability of elements outside the incumbent's network."[13] The Commission should reject ILEC proposals that would, in effect, employ the essential facilities analysis to interpret any degree of availability of a network element from sources

---

[11] *See AT&T Corp. v. Iowa Utilities Board*, 119, S.Ct 721, 730 (1999) ("*Iowa Utilities Board*").

[12] *See Iowa Utilities Board*, 119 S.Ct. at 734 ("The incumbents argue that § 251(d)(2) codifies something akin to the 'essential facilities' doctrine of antitrust theory . . . . We need not decide whether, as a matter of law, the 1996 Act requires the FCC to apply that standard; it may be that some other standard would provide an equivalent *or better* criterion for the limitation upon network-element availability that the statute has in mind.") (citations omitted, emphasis added).

[13] *Id.* at 735.

other than the incumbent to mean that the element is neither "necessary" as a UNE nor unavailable so as to "impair" a competitor's ability to provide service.[14] Under the interpretation advocated by the ILECs, if a single CLEC has procured a network element from a source other than an ILEC, then the inability of any other CLEC to obtain that element from an ILEC cannot be said to impair the ability to provide competitive services.[15] While arguably this may make sense when litigating these issues in light of the essential facilities doctrine precedents, in this context it turns the substantive language of Section 251(d)(2) on its head.

First, the 1996 Act specifically permits a number of entry strategies involving the use of resale, new facilities and UNEs.[16] This approach was adopted by Congress specifically to facilitate competitive entry into local markets by providing CLECs with considerable flexibility when adopting market entry strategies. Adopting the ILECs interpretation would virtually remove UNE-based entry as an alternative for providing competitive services and thereby render ineffective the approach Congress enacted into law. Furthermore, the standards articulated under Section 251(d)(2) require more than the mere possibility that network elements could be obtained from sources independent of the ILEC. The Supreme Court directed the Commission to give some substance to the "necessary" and "impair" standards by including some analysis of the availability of elements from other sources.[17] The Commission should endeavor to harmonize the Act's goal of making

---

[14] Comments of US West at 11; Comments of USTA at 33

[15] *See, e.g.*, Comments of USTA at 33.

[16] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶ 12 (1996) ("*Local Competition Order*").

[17] *Iowa Utilities Board*, 119 U.S. at 736.

network elements available with the standards set forth in Section 251(d)(2) and the Supreme Court's directions relating to consideration of the availability of network elements from sources other than from ILECs' networks. This is properly achieved by considering whether the availability of market alternatives would materially impair the provision of competitive services.

In determining the degree of impairment which must be met to require unbundling under Section 251(d)(2), the Commission should consider the totality of the circumstances, including factors such as the cost, quality, ubiquity, and timeliness of gaining access to the elements from other sources. Adopting the ILECs' approach would simply sacrifice the pro-competitive goals of the Act and the purpose of Section 251(d)(2) to ILECs' desire to limit their unbundling obligations. Accordingly, as urged by RCN and others in initial comments,[18] the Commission should consider the availability of elements from sources other than the incumbent by determining whether they are available at materially the same cost, quality, ubiquity, and in the same time frame as UNEs.

For the same reason, the Commission should reject the view that if one CLEC has self-provisioned a network element, then there is no need for access to it as a UNE.[19] The fact that one or a few competitors have self-provisioned a network element or obtained it from other sources does not show that the element is generally available. It may have been obtained at substantially higher cost and lower quality than would be the case if it were available as a UNE. This could lead to anomalous results. For example large and well-capitalized CLECs could self-provision a given UNE, regardless of the cost in an effort to make it unavailable to competitors as a UNE. Or, a CLEC

---

[18] Comments of RCN at 12; Comments of ALTS at 25-30; Comments of MCIWorldCom at 15-17; Comments of AT&T at 28.

[19] Comments of Bell Atlantic at 8; Comments of US West at 12.

could build a network element while pursuing a business strategy that ultimately proves unsuccessful, thereby precluding other competitors from having access to the element as a UNE and offering competitive services to consumers. Thus, the fact that some competitors may have obtained a network element from sources other than the incumbent does not mean that it is available to the extent that it is not "necessary" or that its absence as a UNE would not "impair" a competitor's ability to provide service. The Commission should similarly reject the argument that access to a network element as a UNE is "necessary" when it is "absolutely essential"[20] for competition or is indispensable for a CLEC to provide service.[21]

B. The Commission Should Adopt A National Minimum List Of UNEs

As pointed out by RCN and other commenters, a national minimum list of network elements that all ILECs must make available is the best approach for implementation of ILEC unbundling obligations.[22] This is the most efficient way to identify network elements that must be offered as UNEs. There are strong policy reasons why the Commission should not adopt any approach that leads to case-by-case or market-by-market determinations regarding which specific UNEs must be unbundled. Permitting case-by-case determinations will create significant administrative burdens for CLECs and foster uncertainty and instability in the market for competitive services. It will also offer the ILECs another tool with which to delay CLEC entry into local telecommunications

---

[20] Comments of USTA at 5. *See also* Comments of Cox at 24.

[21] Comments of US West at 26.

[22] Comments of RCN at 3; Comments of AT&T at 39; Comments of MCIWorldCom at 7; Comments of E.Spire at 7; Comments of CompTel at 24.

markets. The result would be to stifle the development of ubiquitous, robust, irreversible competition in all segments of the telecommunications marketplace.

ILECs have failed to show how any benefits that might flow from the adoption of a geographic or product-based approach to unbundling that would overcome any of the potential harms that approach would cause. RCN's experience is that economic and technical factors are sufficiently uniform across the United States to permit adoption of a national list of minimum UNEs. Moreover, to the extent that a national list of UNEs would suffer from some degree of imprecision, there is no reason to believe that state-by-state implementation would be any better. State boundaries do not define economic, technical, or even geographic boundaries that could form a rational basis for designation of UNEs. Significantly, many state commenters supported adoption of a national list of UNEs.[23]

Furthermore, there is no reason to make distinctions in this context based upon the size of the customer as some ILECs suggest.[24] Requiring ILECs to make network elements available for use in providing service to small customers while not making them available for larger customers would do nothing more than delay the deployment of competitive local service to residential customers. Many CLEC business plans call for entry into local markets incrementally by focusing marketing efforts on larger customers in an effort to generate revenues to offset the costs of network construction. Precluding the use of UNEs for service of larger customers would raise the cost of

---

[23] Comments of California Public Service Commission at 3; Comments of Connecticut Department of Public Utility Control at 3; Comments of Illinois Commerce Commission at 2; Comments of Iowa Utilities Board at 2; Comments of Public Utilities Commission of Ohio at 4; Comments of Public Utilities Commission of Texas at 2; Washington Utilities and Transportation Commission at 5.

[24] Comments of BellSouth at 13-15; Comments of SBC at 23-24.

providing services to those customers. This would force some competitors out of many geographic markets, especially small markets with fewer residential lines. Those competitors that remain would have to delay provision of service to residential customers until they are able to recoup the extra costs associated with self-provisioning. Essentially, this will require many CLECs which are committed to business plans involving the use of UNEs to serve large customers to reconfigure those plans in mid-course. The Commission should not underestimate the disruptive effect this would have on competitors and on competition generally.

Finally, any rule requiring geographic or market definition is bound to create arbitrary delineations which do not comport with the realities of the marketplace. This is especially true given that the *UNE NPRM* did not seek any information on possible market delineations and the record in this proceeding is insufficient to permit the Commission to make reasonable market definitions. Thus, adopting an approach which requires geographic or product market definition would further distort the competitive environment and hamper the development of meaningful competition. Accordingly, the Commission must reject calls for unbundling on either geographic or product bases.

II. COMPARISON OF AVAILABLE ALTERNATIVE NETWORK ELEMENTS SHOULD BE BASED UPON TELRIC PRICING

TELRIC pricing is an appropriate basis for the Commission to use when making comparisons between network elements available as UNEs and those available from other sources. Because UNEs will be available at TELRIC prices, that must be the basis for the comparison because that is the price that CLECs will have to pay for those elements. The ILECs' concern about using TELRIC pricing as the basis for comparison itself indicates that most network elements are not realistically

available from other sources.[25] As the Commission has already determined, the TELRIC pricing methodology is economically rational and best replicates the conditions of a competitive market.[26] As such, efficient providers in a competitive market would most likely employ the TELRIC methodology to set prices for access to network elements. ILEC arguments that TELRIC pricing should not be the basis for comparison because TELRIC pricing is "imaginary" or fictional simply reflect their fundamental disagreement with TELRIC pricing and should be rejected here, just as they were in the *Local Competition Order*.[27]

III. STATES SHOULD BE PERMITTED TO ADD UNES BUT NOT TO REMOVE THEM

RCN believes that the Commission should provide that states may add UNEs to the minimum national list, but not remove any. This would give states sufficient flexibility to respond to local conditions, if any, that warrant additional UNEs while preserving the national uniformity of the minimum list. States should only be permitted to exercise this authority pursuant to federal guidelines. These guidelines should include the definitions of "necessary" and "impair" that the Commission will adopt in this proceeding. In its *Iowa Utilities Board* decision, the Supreme Court acknowledged the Commission's general authority to implement the market-opening provisions of the Act.[28] After *Iowa Utilities Board* it is clear that the Commission has the authority to determine the ground rules for designation of UNEs and may additionally preclude states from removing UNEs

---

25 *See* Comments of US West at 19.

26 *See Local Competition Order* at ¶¶ 678-79.

27 *See Id.* at ¶ 681; *see* Comments of BellSouth at 11-12.

28 *Iowa Utilities Board*, 119 S.Ct. at 730-731.

from the list if the Commission determines that a national list provides for the best implementation of the Act. Accordingly, the Commission must reject the apparent view of some state commissions that they have discretion to apply statutory standards independent of Commission interpretations of the Act.[29]

IV. PROPOSED UNES

In its initial comments, RCN proposed a set of UNEs that it believes preserve UNE-based entry as a viable alternative for competitive provision of local telecommunications services. In contrast, ILECs believe that few if any network elements should be designated as UNEs. Even loops, some ILECs contend, should not be designated as UNEs except outside of major markets.[30]

As discussed above, the ILECs support their restricted view of which elements should be available as UNEs by forcing various tenets of antitrust law into the analysis required under Section 251(d)(2) of the Act. As explained, the Commission is not required to accept those interpretations and can adopt a more balanced approach that will comport with the language and goals of the Act as well as with the requirements of *Iowa Utilities Board.* If the Commission evaluates the availability of networks elements taking into account the totality of the circumstances, including whether there is a material difference in cost, quality, ubiquity, and timeliness, RCN believes that this will satisfy the Supreme Court's decision while providing for designation of all of the network

---

[29] Comments of California Public Service Commission at 8-9; Comments of Illinois Commerce Commission at 2-3; Comments of Iowa Utilities Board at 2; Comments of Kentucky Public Service Commission at 1; Comments of New York State Department of Public Service at 2, 4-5; Comments of Oregon Public Utilities Commission at 1; Comments of Public Utilities Commission of Ohio at 4-5; Comments of Public Utility Commission of Texas at 3; Comments of Vermont Public Service Board at 4-5; Comments of Washington Utilities and Transportation Commission at 7-8.

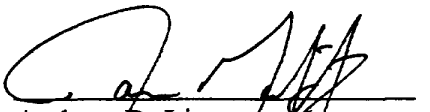
[30] Comments of USTA at 8; Comments of SBC at 23.

elements and UNEs that RCN has requested in this proceeding. Accordingly, RCN urges the Commission to adopt this approach and designate the requested network elements as UNEs.

VI. CONCLUSION

For the foregoing reasons, the Commission should adopt the recommendations in these comments.

Respectfully Submitted,



Joseph A. Kahl
Director of Regulatory Affairs
RCN TELECOM SERVICES, INC.
105 Carnegie Center
Princeton, NJ 08540
(609) 734-2827

Andrew D. Lipman
James N. Moskowitz
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500

Counsel for RCN Telecom Services, Inc.

Dated: June 10, 1999

285551.1

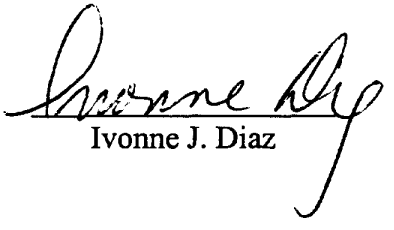
CERTIFICATE OF SERVICE

I, Ivonne J. Diaz, hereby certify that on this 10th day of June 1999, copies of the foregoing Reply Comments of RCN Telecom Services, Inc., were hand delivered to the parties listed below.

Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
12th Street Lobby, TW-A325
Washington, D.C. 20554

Janice M. Miles
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 5-C327
Washington, D.C. 20554

International Transcription Service
1231 20th Street, N.W.
Washington, D.C. 20554



Ivonne J. Diaz